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QUESTIONS PRESENTED

Whether Title II child dependent benefits are child support within the meaning of 42 U.S.C. Section 602(a)(8)(A)(vi) of the Social Security Act, which requires that the first $50 of "any child support payments" received per month be disregarded in determining eligibility and assistance levels under the Aid to Families with Dependent Children (AFDC) program.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the statutes and regulations cited in the Brief for the Petitioner at 2, 42 U.S.C. Section 602(a)(38), set forth in the Respondents' Appendix, is also involved.

STATEMENT OF THE CASE

In 1984, Congress enacted legislation requiring that the first $50 of any child support payments received by a family be disregarded in determining eligibility and assistance levels under the AFDC program: ". . . the State agency . . . shall disregard the first $50 of any child support payments received in such month . . . ." Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, 98 Stat. 1146, Section 2640 (c), codified at 42 U.S.C. Section 602(a)(8)(A)(vi).

Contrary to the plain language of the statute, the Secretary of Health and Human Services has refused to apply the disregard to Title II child dependent benefits. The courts below have rejected the Secretary's overly restrictive interpretation of the statute, finding it arbitrary and irrational to read "any child support payments" as excluding Title II child dependent benefits and thereby to apply the $50 disregard to payments from absent, healthy payors, but not to payments from disabled or deceased workers whose child support comes in the form of Title II.

While $50 per month may seem a small sum of money, it is a significant amount to the children of AFDC households. In Virginia, which has established standards of assistance that are neither the highest nor the lowest in the nation, an assistance unit consisting of a custodial parent and two children can receive a maximum AFDC allotment of $265 per month ($354 in a few areas designated as having a high cost-of-living, *e.g.* Alexandria and Arlington County). *See* 45 C.F.R. Section 233.20(a)(2);

Code of Virginia Section 63.1-110. The additional $50 from the disregard represents nearly a 19% increase in monthly income for those families (14% for those in high cost-of-living areas).

A. Statutory Framework

Child dependent payments under Title II of the Social Security Act, 42 U.S.C. Section 401, *et seq.*, were first established under the 1939 amendments to the Act. Ch.666, Section 201, 53 Stat. 1364-1366. The payments are intended to take the place of support that presumably would have been paid by a wage earning parent to a child but for that parent's retirement, death of disability. The primary purpose of the payments is to provide support for dependents of a disabled, retired or deceased wage earner. *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974); *Mathews* v. *Lucas*, 427 U.S. 495, 507 (1976). The payments are not welfare entitlements; rather, they are based on the earnings paid into the trust fund by the parent when he or she was working. *Califano* v. *Boles*, 443 U.S. 282 (1979). A child is eligible for these payments if he or she: (1) is the child of an "insured" individual as defined by the Act; (2) is or was "dependent" on the insured; (3) applies for the payments; (4) is not married; and (5) is either under eighteen years of age, or older than eighteen but still a full-time elementary or secondary school student. 42 U.S.C. Section 402(d). A child is considered "dependent" for the purposes of Title II eligibility if the insured parent was living with the child or contributing to the child's support at the time of death or disability.

Aid to Families with Dependent Children is a joint federal-state public assistance program designed to provide financial assistance to needy and dependent children and to encourage and preserve a family environment, 42 U.S.C. Section 601; *King* v. *Smith*, 392 U.S. 309 (1968). States choosing to participate must establish statewide "standards of assistance" which reflect the minimum dollar amount that, in the state's judgment, an AFDC family requires to meet its subsistence needs. *Shea* v. *Vialpando*, 416 U.S. 251, 253 (1974); 45 C.F.R. Section 233.20(a)(2). In determining whether a dependent child is also needy, the state must consider the available income and resources of the child and the custodial parent. 42 U.S.C. Section 602(a)(7)(A); 45 C.F.R. Section 233.20(a)(3)(vi).

Congress changed certain features of the AFDC program when it enacted the Deficit Reduction Act of 1984 (DEFRA), Public Law 98-369, 98 Stat. 494. The three DEFRA amendments to the AFDC program relevant to this case are all contained in a single section of the Spending Reduction Act, Section 2640.

Section 2640(a), codified at 42 U.S.C. Section 602(a)(38), provides that the income of any sibling living in the home of a needy child must be considered in calculating the total income of the assistance unit and determining the AFDC eligibility and benefit level of that needy child. This "mandatory filing unit" or "sibling deeming" provision ended the ability of families to exclude independently supported children from the assistance unit.

Section 2640(b) of DEFRA amended 42 U.S.C. Section 657(b)(1) to require the state to "pass through" to the assistance unit the first $50 of support collected each month by the IV-D agency from non-custodial parents or other persons obligated to pay support to the AFDC recipient. The $50 so distributed does not affect the assistance unit's continued eligibility for AFDC or its benefit amount.

Section 2640(c), DEFRA's "disregard" provision, is specifically at issue in this case. It requires the state, in making eligibility or benefit determinations for an assistance unit, to "disregard the first $50 of any child support payments" received per month for the child or children in the family, "including support payments collected and paid to the family under Section 657(b) of this title." *Id.*, codified at 42 U.S.C. Section 602(a)(8)(A)(vi).

The effect of these amendments on AFDC recipients can be seen in the situation of Geneva Powers, one of the named plaintiffs. Ms. Powers of Tazewell County, Virginia, received a monthly Supplemental Security Income (SSI) check of $336 for a nervous condition at the time suit was filed. She also received AFDC benefits of $207 a month for her daughters Nancy and Loretta Powers and was representative payee for daughter Crystal McClanahan's monthly $254 Title II check drawn on her deceased father's earnings. When Crystal was added to the assistance unit by sibling deeming, the AFDC grant was reduced to $11. Because Crystal's support came from Title II survivors benefits rather than from a living parent's earnings, she would not have been entitled under the Secretary's regulations to a disregard of the first $50 of her monthly check and a consequent increase in household income by that amount. J.A. 54-56.

The constitutionality of the "mandatory filing unit" or "sibling deeming" rule was upheld by this Court in *Bowen* v. *Gilliard*, 483 U.S. 587 (1987). The Court's opinion also stated that the reduction in income experienced by many AFDC families because of sibling deeming was "mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the state must be remitted to the family and not counted as income for the purpose of determining its benefit level." 483 U.S. at 594.

B. Prior Proceedings

This case was filed as a class action by five Virginia families, each of which included children who received AFDC and other children who were independently supported by child support paid through Social Security or other sources. They challenged the Secretary's refusal to apply the statutory $50 disregard to Title II child dependent payments as an alternative to their challenge of DEFRA's "mandatory filing unit" or "sibling deeming" provision. J.A. 18-35.

After cross-motions for summary judgment were filed, the district court on November 17, 1986, stayed further proceedings pending this Court's review of the sibling deeming issue in *Bowen* v. *Gilliard*, 483 U.S. 587 (1987) J.A. 5, 62. Following this Court's decision in *Gilliard*, the respondents/plaintiffs voluntarily dismissed those claims which had been disposed of in that case. They retained their claim that the Secretary's withholding of the disregard from Title II child dependent payments violated both the disregard statute and the Equal Protection Clause. They also retained their sibling deeming claims regarding Title II children. J.A. 6, 64-67.

The district court held on December 21, 1987 that children receiving Title II were subject to sibling deeming. Appendix to Pet. for Cert. at 14a-19a. The court also found that Title II payments were entitled to the $50 disregard, holding that "there is no apparent rational justification" for distinguishing between Title II child dependent payments and child support paid by non-custodial, working parents. *Id.* at 19a-22a. The court rejected the Secretary's contention that the $50 disregard was enacted to provide an incentive for non-custodial parents to make child support payments and therefore did not apply to Title II because there is no action the state

can take to collect such benefits. "No legislative history for Section 602(a)(8)(A)(vi) exists to support the defendants' incentive argument," held the court, which ruled that the purpose of the disregard was to mitigate the family's reduction in benefits, citing *Gilliard*. *Id.* at 20a-21a. Since the Title II children bore the same "burden of change" as AFDC children receiving other forms of child support, they were entitled to the same mitigation. *Id.*

On March 4, 1988 the district court denied the Secretary's motion to alter or amend its decision on the disregard. J.A. 9. In a memorandum opinion, the court rejected his contention that the legislative history of a 1974 disregard provision, in effect for one year for the purpose of encouraging the then-new requirement that AFDC recipients cooperate with the state in the collection of child support payments, provided a rational justification for the Secretary's incentive argument. *Id.* at 23a-27a.

The Secretary appealed from the district court's disregard determination on May 3, 1988 and Respondents cross-appealed on May 13, 1988 on the assistance unit ruling. J.A. 10-11. The Fourth Circuit Court of Appeals affirmed on both issues in an opinion filed March 28, 1989. Cert. Pet. App. at 1a-13a. Finding that the disregard served to mitigate the effect of the sibling deeming, the court held that the Secretary's refusal to apply the disregard to Title II child dependent payments was based on an impermissible interpretation of the statute. *Id.* at 8a-13a. The court rejected the Secretary's incentive argument, noting that there was no legislative history for the present statute to support such a rationale and that the 1974 legislative history was inapplicable. "It is axiomatic that the intent of one Congress cannot be inferred from

the activities of another Congress." *Id.* at 9a. The court went on to observe:

> We perceive no distinction between support derived directly from a father's wages and support provided indirectly through Title II payments. In both cases, it is the father, a wage earner, whether current or past, who provided the support. The money to support the child comes directly through the father or indirectly through insurance he earned when working. In each instance the $50 disregard would serve the purpose the Supreme Court identified in *Gilliard*, 107 S. Ct. at 3013.

Id. at 11a. The court decided the issue solely on the basis of statutory construction, but noted that the Secretary's disparate treatment of the two classes of child support recipients raised equal protection concerns as well. *Id.* at 11a-12a.

On May 31, 1989, the Fourth Circuit denied the Secretary's petition for rehearing and suggestion for rehearing *en banc*. J.A. 16.

SUMMARY OF ARGUMENT

The $50 disregard provision of DEFRA was enacted by Congress to "mitigate somewhat" the financial hardship that befell AFDC families by DEFRA's sibling deeming provision. *Bowen* v. *Gilliard*, 483 U.S. at 594. The provision on its face applies to "any child support payments . . . (including support payments collected and paid to the family under Section 657 [sic] of this title)." The Secretary, however, seeks to convince this Court that Congress, in choosing this language, intended to exclude from the disregard's application an entire category of child support payments of which it was acutely aware: the fifty year old Title II child dependent payments program. Employing elaborate, non-textual aids to construction, he portrays

the term "child support" as a technical term of art which cannot be construed as its ordinary meaning would suggest.

The best indication of congressional intent is the statutory text itself. "Any" has long been construed in the broadest, most inclusive terms possible. *All* forms of child support qualify for the disregard under this language. The "including" parenthetical indicates that payments collected by state IV-D agencies are only part of the wider set of child support payments subject to the disregard. However, the Secretary narrowly construes this language in direct derogation of its plain meaning to encompass virtually no other child support payments except those passing through the IV-D system. The Secretary seizes upon language added to the disregard by the Family Support Act of 1988 to justify his narrow construction, but those amendments have no relevance one way or the other to the issues in this case.

Because of the broad sweep of the statutory language, the Secretary's interpretation can only prevail if it is determined that Title II child dependent payments are not "child support" at all. However, Title II is almost universally regarded as child support; indeed the sole purpose of the checks is to support children. Noting the purpose of Congress in establishing this program in 1939, this Court has always recognized the support character of these payments. The Secretary concedes that the payments are generally viewed as child support but attempts to justify his policy by relying on strained, technical distinctions between Title II child dependent payments and other forms of child support. The distinctions he draws, however, only highlight the fact that he himself has no definition of child support to offer. He instead conjures a

vague, ephemeral "essence of child support" which defies accurate description and renders his distinctions absurd.

As this Court observed in *Gilliard*, 483 U.S. at 594, the legislative history of the disregard provision strongly suggests that it was enacted to mitigate the effects of sibling deeming, with which it is chronologically and conceptually linked. Secretary Heckler proposed the sibling deeming concept in a legislative package submitted to Congress in 1982. The provision passed the Senate but died in the House. A second proposal met a similar fate in 1983. In 1984 the Senate passed the provision a third time; it was approved in Conference Committee only after the disregard provision was accepted.

The Secretary, however, seems to be unable to accept that the legislative package was not enacted as proposed. He draws upon the legislative history of a completely unrelated disregard statute which expired ten years ago to make the claim that the present disregard was enacted not to mitigate but to provide an incentive for absent parents to make payments to the IV-D agency. He also seeks to draw this conclusion from the legislative history of the 1984 Child Support Enforcement Amendments which were enacted after DEFRA. Pub. L. 98-378, 98 Stat. 1321 (1988). His analysis, however, is patently erroneous and contrary to basic principles of statutory construction.

The Secretary's failure to apply the disregard statute in accordance with its plain language and mitigating purpose leads him to bizarre results such as allowing the disregard for certain spousal support payments while denying the disregard for Title II. His interpretation of this statute has been irrational and inconsistent as well as contrary to the clear congressional intent and should not be deferred to.

ARGUMENT

THE SECRETARY'S REFUSAL TO APPLY THE BENEFITS OF DEFRA'S DISREGARD PROVISION TO CHILDREN RECEIVING TITLE II CHILD DEPENDENT PAYMENTS VIOLATES 42 U.S.C. SECTION 602(a)(8)(A)(vi).

The Secretary seeks to convince this Court that a disregard provision applying on its face to "any child support payments" somehow does not apply to Title II child dependent payments, the sole purpose of which is to support children. Straining to create ambiguity where none exists in order to invite deference to his position, he cites the legislative histories of statutes that expired more than a decade ago and uses other elaborate, non-textual aids to construction in the hope that the term "child support" will be seen as some technical term of art, to be construed in a way other than common sense and ordinary usage would dictate. However, his baroque approach to statutory construction does not withstand scrutiny.

Review of the Secretary's interpretation begins with a determination, using traditional tools of statutory construction, of whether Congress has spoken directly to the precise question at issue. *N.L.R.B.* v. *United Food and Commercial Workers Union*, 484 U.S. 112 (1987); *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The precise question at issue in this case is: whether Congress, in using the phrase "any child support payments," intended to exclude child dependent payments made under Title II of the Social Security Act from the application of the $50 disregard.

If the intent of Congress on this issue can be determined after a review of the statute's language, structure and legislative history, "that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. *See also*

Dole v. *United Steelworkers*, ___ U.S. ___, 58 U.S.L.W. 4200 (1990); *I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. 421, 440-445 (1987). If congressional intent cannot be determined, that is, if the statute is found to be ambiguous or silent on the question at issue, the inquiry becomes whether the Secretary's interpretation is rational and consistent with a permissible reading of the statute and therefore entitled to deference. *Chevron*, 467 U.S. at 844-845. *See also Sullivan* v. *Zebley*, ___ U.S. ___, 58 U.S.L.W. 4177 (1990).

Congress's intent in this instance can be determined unqualifiedly from the text of the statute itself. Utilization of other traditional tools of statutory construction to discern the structure and purpose of the statute only confirms what the words plainly say: that "any child support payments" are to be accorded disregard treatment. Title II child dependent payments were not intended to be excluded.

A. The Secretary's Narrow Application Of The Disregard Contradicts The Plain Meaning Of The Statutory Language.

The best source for determining the intent of Congress is the text of the statute itself. ". . . (O)ur starting point must be the language employed by Congress . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *I.N.S.* v. *Phinpathya*, 464 U.S. 183, 189 (1984) (internal quotation marks omitted). *See also Dole* v. *United Steelworkers*, 58 U.S.L.W. at 4202. The AFDC disregard provision as originally enacted in DEFRA, Pub. L. No. 98-369, Section 2640(c), 98 Stat. 1146 (1984) stated:

> [I]n making the [AFDC eligibility and assistance] determination under paragraph (7), the State agency

* * *

> (vi) shall disregard the first $50 of *any* child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (*including* support payments collected and paid to the family under Section 657(b) of this title). (Emphasis added).

The plain language of the section makes no distinction among classes of child support payments that trigger or do not trigger the disregard—"*any* child support payment" (emphasis added) qualifies for a disregard. "Any" has long been construed by this Court in the broadest, most inclusive terms possible. *See, e.g., Johnson* v. *Southern Pacific Co.*, 196 U.S. 1, 16 (1904) ("any car" in railroad safety statute held to apply to "all kinds of cars running on the rails, including locomotives."); *United States* v. *Rosenwasser*, 323 U.S. 360, 362-363 (1945) ("A broader or more comprehensive coverage . . . would be difficult to frame."); *International Union of Operating Engineers* v. *Flair Builders*, 406 U.S. 487, 491 (1972) ("There is nothing to limit the sweep of this language. . . .").

More recently, in *United States* v. *James*, 478 U.S. 597 (1986), a provision of the Flood Control Act that "no liability of any kind" could attach to the United States for "any damage from or by flood waters at any place" was held to bar recovery under the Federal Tort Claims Act. Justice Powell wrote for the majority at 478 U.S. 597, 604-605:

> It is difficult to imagine broader language. . . . Given the nature of the accidents at issue and given the plain terms of the statute, "it requires some ingenuity to create ambiguity" (Citations omitted). . . . Moreover, Congress's choice of the language "*any* damage" and "liability of *any* kind" further undercuts a narrow construction. (Emphasis supplied in text).

"Any" was construed in the context of the AFDC program in *Shea* v. *Vialpando*, 416 U.S. 251 (1974). Justice Powell wrote for a unanimous Court:

> By its terms, Section 402(a)(7) [42 U.S.C. 602(a)(7)] requires the consideration of "any" reasonable work expenses in determining eligibility for AFDC assistance. In light of the evolution of the statute and the normal meaning of the term "any," we read this language as a congressional directive that no limitation, apart from that of reasonableness, may be placed upon the recognition of expenses attributable to the earning of income. Accordingly, a fixed work-expense allowance which does not permit deductions for expenses in excess of that standard is directly contrary to the language of the statute.

416 U.S. at 260.

Clearly, the word "any" modifying "child support payments" in Section 602(a)(8)(A)(vi) signifies Congress's intent to apply the $50 disregard to all forms of child support received by the AFDC family for the use and benefit of dependent children.

The reach of the disregard is not limited in any way by the parenthetical "including" clause at the conclusion of the section. On the contrary, this language indicates unequivocally that Congress intended those support payments collected by the IV-D agency and passed through to the family to be only a part of the wider universe of child support payments subject to disregard treatment. *See* Sands, 2A *Sutherland Statutory Construction*, (4th Ed. 1985), Section 47.07 at 133; *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517 (1933) (". . . 'include' is . . . used as a word of extension or enlargement rather than as one of

limitation or enumeration"); *Federal Land Bank* v. *Bismark Lumber Co.*, 314 U.S. 95, 100-101 (1941) (". . . term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"). The Secretary's suggestion that the "including" parenthetical's reference to the pass-through provision somehow limits the scope of "any child support payments" and that it is "reasonable" to assume that the disregard section and the pass-through section are referring to the same kind of child support payments, Brief at Pet. at 18, is simply at odds with what the statute plainly says.

The Secretary makes much of the 1988 Family Support Act which inserted additional language into the disregard and pass-through provisions, Pub. L. No. 100-485, 102 Stat. 2346, Section 102(a) (to be codified at 42 U.S.C. Section 602(a)(8)(A)(vi)) and Section 102(b) (to be codified at 42 U.S.C. Section 657 (b)(1)). The disregard as amended requires that the state agency

> (vi) shall disregard the first $50 of any child support payments *for such month* received in that month, *and the first $50 of child support payments for each prior month received in that month if such payments were made by the absent parent in the month when due*, with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title). (Emphasis added to language inserted by the amendment).

The language added to the pass-through provision was similar. *See* Brief of Pet. at 3. The Secretary seeks to draw an inference from the reference to "absent parent" that Congress never intended the disregard to apply to Title II child dependent payments and that "child support payments" therefore refers only to support paid by a currently working absent parent into the IV-D agency. *Id.* at 15-18.

Such an inference is untenable given the fact that the amendments left unchanged the operative language "any child support payments" and the "including" parenthetical. As the Secretary himself admits, *Id.* at 16 n.14, the added language only addresses the issue of how *many* disregards an AFDC household can claim if an absent parent misses payments for several months and then cures the arrearage with one large payment. The statute now makes clear that households in such circumstances are entitled to a single $50 disregard, not to multiple disregards. This is not a scenario that is limited to IV-D payments. The amendments can also apply to retroactive Title II payments for the months between application for Title II and approval of entitlement that are received by an AFDC household. Those payments would also receive a single $50 disregard.

There is nothing in the added language or in the legislative history of the amendments to indicate that Congress was in any way attempting to limit the meaning of "any child support payments" or narrow the broad applicability of the disregard. Indeed, the Senate Committee Report specified: "(the Committee) does not intend that an inference should be drawn from the enactment of this provision or its effective date as to the meaning of the law as previously in effect."[1] S. Rep. No. 377,

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[1] The Secretary himself notes at Brief of Pet. 16 n.14 that this language is a reference to the issues litigated in *Wilcox* v. *Ives*, 864 F.2d 915, 926 (1st Cir. 1988) (finding that the disregard and pass-throughs provisions as originally enacted required separate pass-throughs and disregards for multiple payments); 864 F.2d at 926 (Breyer, J. concurring) (noting that the 1988 amendments adopted the

100th Cong., 2d Sess. 17 (1988). The retention of the "including" parenthetical and the phrase "any child support payments" undercuts rather than supports the Secretary's interpretation.

It is a well-established canon of statutory construction that effect be given to all the words used by Congress. *See, e.g., Weinberger* v. *Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 633 (1973). However, in creating his narrow interpretation, the Secretary carefully reads the word "any" out of the disregard section altogether and construes "including" as a term of limitation rather than as a term of extension or enlargement. Congress's intent, as deduced from the language it chose to enact, was that the disregard be applied as broadly, not as narrowly, as possible.

B. Title II Child Dependent Payments Are "Child Support Payments" Within The Broad Ambit Of The Statute.

Given the broad sweep of the statutory language, the Secretary can only avoid applying the disregard to Title II child dependent benefits by asserting that such benefits are not really "child support payments" at all. However, this assertion is undercut by the very HHS Departmental

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Secretary's view for the future). Prior to the 1988 amendments, every court that had considered the multiple pass-through/disregard issue had ruled against the Secretary and found that a disregard for each monthly payment was required by the plain statutory language. *See, e.g., Beasley* v. *Harris*, 671 F.Supp. 911 (D. Conn. 1987); *Humble* v. *Department of Public Aid*, 165 Ill. App.3d 624, 116 Ill. Dec. 509, 519 N.E.2d 99 (1988); *Vanscoter* v. *Bowen*, No. C86-1568WD (W.D. Wash. July 15, 1988). The attention of Congress clearly was directed to the issues raised in these cases when it enacted the 1988 amendments, not to the entirely different issue of the disregard's applicability to Title II child dependent payments.

Appeals Board decision he lodged with this Court as illustrative of his interpretation of DEFRA. *See Georgia Department of Human Resources*, Docket No. 88-40, Dec. No. 995 (November 4, 1988). In upholding the Family Support Administration's disallowance of the state agency's claim for corrective payments which it made pursuant to orders from Georgia courts to apply the disregard to Title II payments, the Board concluded "that *while these benefits might be viewed generally as child support*, FSA reasonably determined that they did not fall within the *narrower* concept of the Act." *Id.* at 1 (emphasis added). The Secretary again chooses not to read all the words of the statute and arbitrarily limits the disregard to IV-D pass-through payments.

Title II child dependent payments are "generally viewed as child support" because that is exactly what they are. They are payments made to children whose parents are disabled, aged or deceased wage earners. 42 U.S.C. Section 402(d). These payments are based on the wages earned by the parents when they were working, and are to be used exclusively for the support and maintenance of those children. 42 U.S.C. Section 405(j); 20 C.F.R. Section 404.2035. In fact, a representative payee for a child receiving Title II who does not use the payments solely for the support of that child is subject to criminal penalties of up to five years imprisonment and a $5,000 fine. 42 U.S.C. Section 408(e). *See also* 20 C.F.R. Section 404.2041.

First established under the 1939 amendments to the Social Security Act for the minor children of retired or deceased workers, Pub. L. 76-379, 53 Stat. 1362, Title II child dependent payments were intended as support from their inception. As stated in the House Committee Report, "The purpose of these child's benefits is to assure

the child of a monthly amount based on the wages of the parent or the deceased parent." H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939), *reprinted in* 84 Cong. Rec. 6722 (June 6, 1939). The changes in the Act creating the benefits were "designed to afford more adequate protection to the family as a whole" and to "pay benefits in accordance with the probable needs of the beneficiaries." *Id.* at 6713.

The 1958 amendments to the Social Security Act extended Title II to the dependents of an insured worker who becomes disabled and entitled to disability insurance benefits. Pub. L. 85-840, 84th Cong. 2d Sess. The comments of the House Committee at that time clearly reveal the intended purpose of the benefits, i.e., to support children:

> In providing monthly benefits for the dependents of workers entitled to disability insurance benefits, your committee has given recognition to the problems confronting families whose breadwinners have been forced to stop work because of total disability. The benefit amount payable to the disabled worker under the present disability insurance provisions does not provide adequate protection for his family. The needs of the family of a disability insurance beneficiary are as great as, or greater than, the needs of the family of an old-age insurance beneficiary.

H.R. Rep. No. 2288, 85th Cong. 2d Sess. 12 (1958). *See also* S. Rep. No. 404, 89th Cong., 1st Sess., 110 (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News 2050 (program intended to "pay benefits to replace the support lost by a child when his father retires, dies or becomes disabled").

In light of such clearly expressed congressional purpose, this Court has always recognized the support character of these payments. "As we have noted, the

primary purpose of the . . . Social Security scheme is to provide support for dependents of a disabled wage earner." *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974). The payments have been described as "attempts to obviate, through a program of forced savings, the economic dislocations that may otherwise accompany old age, disability, or the death of a breadwinner." *Califano* v. *Boles*, 443 U.S. 282, 283 (1979). Because the payments are based on the earnings contributed by the retired, deceased or disabled parents, the Court has frequently noted that they are not welfare benefits:

> The old-age and disability insurance aspects of the Social Security system do not purport to be general public assistance laws that simply pay money to those who need it most. That was not the predominant purpose of these benefit provisions when they were enacted or when they were amended. Rather, the primary objective was to provide workers and their families with basic protection against hardships created by the loss of earnings due to illness or old age.

Mathews v. *DeCastro*, 429 U.S. 181, 185-186 (1976). *See also Mathews* v. *Lucas*, 427 U.S. at 507 (statute not a general welfare provision, but designed to replace support).

Congress did not include a definition of "child support" in the disregard enactment. In the absence of a congressionally supplied definition, this Court has looked to the common understanding of the language used and has presumed that Congress chose to give ordinary meaning to ordinary words. *Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975). The Secretary purports to find this "ordinary meaning" at *Black's Law Dictionary* 217 (5th Ed. 1979), which defines "child support" in terms of a "legal obligation" to contribute to a child's economic maintenance. Brief of Pet. at 13, n.9. However, this Court has tradi-

tionally turned to authorities of general reference, not to legal dictionaries, to find "ordinary meaning to ordinary words." *See*, e.g. *Sullivan* v. *Everhart*, ___ U.S. ___, 58 U.S.L.W. 4215, 4217 (1990). "Support" is defined at *Webster's Third New International Dictionary* 2297 (Unabridged, 1981) as "a means of livelihood, sustenance or existence, . . . a person or agency that furnishes support." *Random House Dictionary of the English Language* 358 (Unabridged, 2d Ed. 1987) defines "child support" as "money paid for the care of one's minor child, especially payments to a divorced spouse or a guardian under a decree of divorce." There is nothing contained in these day-to-day definitions that would support the Secretary's contention that Title II child dependent payments are not child support.

No substantive body of federal law reflecting a generally agreed upon definition for the term "child support" exists. Of course, the courts of the fifty states deal with this term on a regular basis, making reference to state law for the purpose of discerning a common definition, if any, appropriate. It should be presumed that when Congress uses words of accumulated and settled meaning, it means to incorporate the established meaning of such terms, *see Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979).

An overwhelming number of state courts that have considered the nature of Social Security children's benefits have concluded that they are a form of insurance, earned by the worker and directly attributable to his participation in the work force. Once this characterization is accepted, the benefits are seen not as some gratuity but as a product of the parent's labor that should be credited against any support obligation. At least seventeen states credit such payments against the support obligation automatically.[2] At least another ten states allow discretionary credit against the obligation on a case-by-case basis—not because of any lack of recognition that these payments are child support, but rather out of a concern that an automatic credit against a support obligation would constitute a unilateral modification affecting the integrity of the support decree.[3]

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[2] ALABAMA: *Binns* v. *Maddox*, 57 Ala. App. 230, 327 So.2d 726 (1976) (disability); *Bowden* v. *Bowden*, 426 So.2d 448 (Ala. Ct. App. 1983) (death benefits). ARIZONA: *Lopez* v. *Lopez*, 125 Ariz. 309, 609 P.2d 579 (Ct. App. 1980) (retirement benefits). ARKANSAS: *Cash* v. *Cash*, 234 Ark. 603, 353 S.W.2d 348 (1962) (retirement benefits). COLORADO: *Meek* v. *Meek*, 669 P.2d 628 (Colo. Ct. App. 1983). GEORGIA: *Perteet* v. *Sumner*, 246 Ga. 182, 269 S.E.2d 453 (1980) (disability). IOWA: *Potts* v. *Potts*, 240 N.W.2d 680 (Sup.Ct. Iowa 1976). KANSAS: *Andler* v. *Andler*, 217 Kan. 539, 538 P.2d 649 (1975) (disability). KENTUCKY: *Board* v. *Board*, 690 S.W.2d 380 (Ky. 1985) (death benefits). LOUISIANA: *Folds* v. *Lebert*, 420 So.2d 715 (La. Ct. App. 1982) (disability). MASSACHUSETTS: *Cohen* v. *Murphy*, 368 Mass. 144, 330 N.E.2d 473 (1975) (disability). MISSISSIPPI: *Mooneyham* v. *Mooneyham*, 420 So.2d 1072 (Sup.Ct. Miss. 1982) (disability). NEBRASKA: *Shulze* v. *Jensen*, 191 Neb., 253, 214 N.W.2d 591 (1974) (disability). *Lainson* v. *Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985) (disability). NEW JERSEY: *Potter* v. *Potter*, 169 N.J. Super. 140, 404 A.2d 352 (App. Div. 1979). NEW MEXICO: *Mask* v. *Mask*, 95 N.M. 229, 620 P.2d 883 (1980) (retirement). *Romero* v. *Romero*, 101 N.M. 345, 682 P.2d 201 (Ct. App. 1984) (disability). PENNSYLVANIA: *Children & Youth Servs.* v. *Chango*, 341 Pa. Super. 512, 491 A.2d 1374 (1985) (disability). SOUTH CAROLINA: *Justice* v. *Scruggs*, 286 S.C. 129, 332 S.E.2d 106 (S.C. 1985) (disability). VERMONT: *Davis* v. *Davis*, 141 Vt. 398, 449 A.2d 947 (1982) (disability).

[3] CONNECTICUT: *Fowler* v. *Fowler*, 156 Conn. 569, 244 A.2d 375 (1968) (disability). ILLINOIS: *Nakaerts* v. *Nakaerts*, 106 Ill. App. 3d 166, 435 N.E.2d 791 (1982) (death benefits). INDIANA: *Brummett* v. *Brummett*, 472 N.E.2d 616 (Ind. Ct. App. 1984) (survivor's benefits). MICHIGAN: *Gibson* v. *Gibson*, 110 Mich. App. 666, 313 N.W.2d 179

In an attempt to refute the enormous body of authority indicating that Title II child dependent payments are child support, the Secretary cites to twenty-two references to "child support" and "child or spousal support" in Title IV of the Social Security Act. Brief of Pet. at 13. In each instance, he asserts, the reference is to payments from absent parents, not to Title II Social Security. However, the Secretary's examples beg the question, for each citation is to a section of the Act dealing with some aspect or other of the IV-D collection system. The IV-D system was established to collect support payments from working, non-custodial parents. Under Section 2640(b) of DEFRA, 42 U.S.C. Section 657(b)(1), $50 of the support so collected is "passed through" to the AFDC family per month; under DEFRA Section 2640(c), 42 U.S.C. Section 602(a)(8)(A)(vi), that $50 is disregarded. Naturally, none of the references to "child support" in the cited sections would be to Title II, because Title II is not routed through the IV-D system. That does not matter, however, because the disregard statute plainly states that payments to IV-D agencies pursuant to 42 U.S.C. Section 657(b)(1) are only one type, not the only type, of all the forms of child support which qualify for the disregard. The Secretary's citations demonstrate nothing other than his convoluted, circular, extra-textual approach to statutory construction.

(1981) (death benefits). MINNESOTA: *In re Haynes*, 343 N.W.2d 679 (Minn. Ct. App. 1984) (retirement benefits). MISSOURI: *Craver* v. *Craver*, 649 S.W.2d 440 (Sup.Ct. Mo. 1983) (in dicta). NEW HAMPSHIRE: *Griffin* v. *Avery*, 120 N.H. 783, 424 A.2d 175 (1980) (disability). NEW YORK: *Passaro* v. *Passaro*, 92 A.D.2d 861, 459 N.Y.S.2d 839 (1983) (disability). OKLAHOMA: *Nibs* v. *Nibs*, 625 P.2d 1256 (Sup.Ct. Okla. 1981) (disability). WASHINGTON: *Chase* v. *Chase*, 74 Wash. 2d 253, 444 P.2d 145 (1968) (disability).

One of the citations is nevertheless of some interest, because it contains the Social Security Act's only definition of "child support." 42 U.S.C. Section 662(b). The definition is limited to "the purposes of section 659 of this title" (which concerns the enforcement of an individual's legal obligation to provide child support or alimony) and is therefore inapplicable to the disregard provision, but it shows that Congress thought of "child support" in the broadest possible terms:

> (b) The term "child support", when used in reference to the legal obligations of an individual to provide such support, means periodic payments of funds for the support and maintenance of a child or children with respect to which such individual has such an obligation, and (subject to and in accordance with State law) includes but is not limited to, payments to provide for health care, education, recreation, clothing, or to meet other specific needs of such a child or children; such terms also includes attorney's fees, interest, and court costs, when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction.

Title II child dependent payments were created in 1939 for the sole purpose of providing support for children. Congress has amended the program numerous times during the past fifty years, each time with the intention of further advancing this stated purpose. The ordinary meaning of the term "child support" encompasses Title II child dependent payments. Such payments are overwhelmingly recognized as child support by the states. There is nothing in the statutory scheme of the AFDC program and the Social Security Act that would suggest that these payments are not child support. Clearly, the

disregard statute's broad application to "any child support payments" would include Title II.

C. The Secretary Contrives Artificial Distinctions Between Title II Child Dependent Payments And Other Forms Of Child Support To Justify His Interpretation Of The Disregard Statute.

Despite the plain statutory language applying the disregard to "any child support payments" and the nearly universal recognition of Title II child dependent payments as child support, the Secretary presents a series of strained technical distinctions between support provided directly from an absent, working parent's wages and support provided indirectly through Title II that he claims justifies differential treatment. Brief of Pet. at 13-18, 27.

What is most revealing about the Secretary's purported distinctions is that they are not based on any definition of "child support" that he himself offers. Instead, working from the *Black's Law Dictionary* definition discussed *supra*, he conjures a vague, ephemeral "essence of child support" that seems to consist of some sort of legal obligation (he does not say what) and a requirement that the parent payor be simultaneously healthy, absent from the home and gainfully employed (he does not say why). Many of the courts which have considered the disregard's applicability to Title II[4] have noted this deficiency, but

[4] The following courts have held that the disregard should be applied to Title II: *Brown* v. *McMahon*, 722 F.Supp. 1573 (E.D. Cal. 1989) (reprinted in Respondents' Brief in Opp. to Pet. for Cert. in appendix); *Jackson by Forrest* v. *Mullany*, 708 F.Supp. 483 (N.D.N.Y. 1989); *D'Antignac* v. *Perales*, No. 16444-86 (N.Y.Sup.Ct. App. Div. May 9, 1988); *McBee* v. *Sallee*, No. 2-86-103 (E.D. Tenn. Nov. 26, 1986); *Davis* v. *Sallee*, No. 4-86-27 (E.D. Tenn. Oct. 10, 1986); and *Ledbetter* v. *Foster*, 180 Ga. App. 696, 350 S.E.2d 31 (1986).

The following courts have held that the disregard does not apply to Title II: *Baylor* v. *New Jersey Dept. of Soc. Serv.*, 235 N.J. Super 22, 561 A.2d 618 (1989); *Todd* v. *Norman*, 840 F.2d 608 (8th Cir. 1988).

few have summarized the problem as cogently as Chief Judge Lay in his dissent in *Todd* v. *Norman*, 840 F.2d 608, 614 (8th Cir. 1988):

> The Secretary has never promulgated a definition of the term "child support payments" that would exclude social security child's insurance benefits, and no evidence has been presented to demonstrate that the agencies previously addressed the question presented in this law suit. The agencies involved in this case should not be accorded deference because the agencies' interpretation has neither been consistent nor long standing (citation omitted), but rather is an ad hoc response to litigation.

The first distinction offered by the Secretary is that while "parental child support payments" as he calls them are "dependent on the resources and compliance of an absent parent," Title II payments are "paid and guaranteed by the federal government." This argument, of course, ignores some central features of Title II—that the payments are drawn from earnings that were paid into a trust fund while the insured was working, and that the amount of the payments varies with the amount paid into the fund. 42 U.S.C. Section 401-433. Title II payments are not welfare entitlements, as the Secretary implies. *See Califano* v. *Boles; Mathews* v. *DeCastro; Mathews* v. *Lucas*, cited *supra* at 19. Whether the payment is called "parental child support" or Title II child dependent benefits, the ultimate *source* is precisely the same: parental earnings. More importantly, the *purpose* of the funds and the use to which they are put is precisely the same in either instance: the support and maintenance of a child. This Court rejected the same kind of form-over-function approach being advocated by the Secretary in *Rose* v. *Rose*, 481 U.S. 619 (1987). In *Rose*, it was held that a state court could attach veteran's benefits to satisfy a child support obligation. It was reasoned that funds paid to a

disabled father in the form of such benefits were a source of child support even though they emanated from a government benefits program rather than from the father's current earnings.

The Secretary also seems to be saying that Title II payments somehow lose their character as child support because they are not paid through an act of volition but rather arrive automatically every month. However, current wage earners are often required to pay support through intermediary sources as when courts enter mandatory wage assignment orders. In fact, the Family Support Act of 1988 will soon require that *all* IV-D agency collections be accomplished through immediate wage withholding. Pub. L. No. 100-485, Section 101(a), Codified at 42 U.S.C. Section 666(b)(3). Then, both the "parental support" payor and the disabled insured parent will be considered to be making child support payments even though neither one will be paying directly and neither one will have control over the delivery of payments.

The Secretary's "essence of child support" also appears to require the existence of a legal obligation. He notes that the largest number of Title II child dependent payment recipients consists of children of deceased parents, as in fact are two of the named plaintiffs, Crystal McClanahan and Robert Turner. Brief of Pet. at 28. He asserts that for such children, there is no outstanding child support obligation for the payor parent at all, and that therefore the payments they receive are something other than child support.

The Secretary's thesis is of course derived from the *Black's Law Dictionary* definition of child support discussed *supra*, not from the ordinary meaning of the term. He forgets that both Congress and this Court have

characterized Title II payments as child support regardless of whether the parent payor is disabled, retired or deceased. *See*, e.g. *Mathews* v. *Lucas*, 427 U.S. at 507. His thesis also fails because, even in his own limited view of what can be called child support, existence of an established legal obligation is not essential. Under his regulations, the first $50 of voluntary support payments received by an AFDC family in a month are disregarded, 45 C.F.R. 303.80(a), even though the payments are received directly by the family and no obligation to pay support has been established.

Moreover, Title II eligibility is grounded on a finding that the child is or was dependent upon the insured, that is, that the child was living with the insured or being supported by the insured at the time of death or disability. The numerous criteria for dependency established by Congress all hark back either to a past legal obligation to support or to an obligation which could have been formalized legally and was observed in fact. *See*, e.g. 42 U.S.C. Sections 402(d)(1)-(4).

The Secretary further posits that Title II child dependent payments cannot be child support for the purposes of AFDC because of the program's requirement that all support rights be assigned to the state IV-D agency. 402 U.S.C. Section 602(a)(26)(A) and (B). Title II payments are not assignable. 42 U.S.C. Section 407. However, this does not pose any barrier to the application of the disregard. A custodial parent receiving Title II child dependent payments for one of her children and applying the AFDC for the family unit would assign the family's right of support to the state in order to meet eligibility and cooperation requirements. The child's Title II payments are not assignable for collection, so the custodial parent would continue to receive these support payments

directly and the IV-D agency would not collect or distribute them. The parent would report this and all other income received to the state welfare agency, which, after applying the disregard, would count the Title II payment as income in computing the family's grant. 45 C.F.R. Section 233.20(a)(3)(v)(B). The funds in fact would be treated exactly like the voluntary payments which already receive disregard treatment under the Secretary's regulations. 45 C.F.R. Section 303.80(a).

Another assertion made by the Secretary is that the amount of the Title II payments is based solely on the level of earnings paid by the insured into the trust fund and not on any consideration of the actual need of the child. "Parental child support payments" are based in part on a determination of need, he argues, citing H. Krause, *Child Support in America* 18 (1981). However, this citation is out of date. Pursuant to the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1321, states are required to establish child support guidelines. In Virginia, a support award is calculated after determining the parents' combined gross monthly income, determining from that figure using a grid prepared by the state their combined monthly support obligation for the number of children involved, and setting the non-custodial parent's obligation as a percentage of that combined monthly support obligation, such percentage being the percentage of the combined gross income that is made up by that parent's income. *See* e.g. Code of Virginia Section 20-108.2. There is no individualized determination of need—the support figure is computed from parental income only. Under the Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, use of these guidelines became presumptive in all states as of October 1989.

The Secretary's so-called "distinctions" are artificial and strained. He can only exclude Title II payments from the disregard's application by using the narrow, formalistic analysis of *Georgia Department of Human Services*, *supra*, which is clearly at odds with the legislative purpose of Title II and the plain meaning of DEFRA's statutory language.

D. The Secretary's Denial Of The Mitigating Purpose Of The Disregard Statute Is Premised On the Legislative Histories Of Previous And Unrelated Statutes.

In upholding the constitutionality of the DEFRA amendment to the AFDC program establishing the "sibling deeming" or "mandatory filing" rule, *Bowen* v. *Gilliard*, this Court stated concerning the $50 disregard:

> Because the 1984 amendments forced families to include in the filing unit children for whom support payments were being received, the practical effect was that many families' total income was reduced. The burden of the change was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the State must be remitted to the family and not counted as income for the purpose of determining its benefits level. (footnotes omitted).

483 U.S. at 594. The Court may have made this observation partially at the prompting of the Secretary, who had argued in brief that the disregard had been enacted to "mitigate the potential disadvantage" inherent in the fact "that the child support assigned to the state in consequence of the new filing-unit provision might sometimes be greater than the marginal increase in AFDC benefits obtained by the family in filing as a larger unit." Brief for the Federal Appellant, *Bowen* v. *Gilliard*, No. 86-509, *Gilliard* v. *Bowen*, No. 86-564 (October Term 1986) at 14.

The legislative history of the disregard provision shows that it came about as a result of a House-Senate compromise that enabled the sibling deeming provision to be enacted. The context of the disregard's passage strongly suggests that its primary purpose was to lessen the impact of sibling deeming on the affected families.

The Secretary, however, is now asserting to this Court that the primary purpose for the disregard is not mitigation at all, but rather to provide an incentive to encourage cooperation by the custodial AFDC parent in obtaining child support payments from the absent parent. Using this rationale, the Secretary posits that Congress could not have logically intended the disregard to apply to Title II payments because the incentive element would be lacking due to the automatic delivery of such payments. However, there is nothing in the legislative history to even suggest that Congress intended the disregard to serve an incentive purpose. What the Secretary really wishes to do is to apply the DEFRA AFDC amendments as they were originally proposed to Congress rather than as they were finally enacted. The Secretary therefore relies on the legislative histories of completely unrelated statutes and enactments that expired more than a decade ago.

The "sibling deeming" or "mandatory filing" rule, DEFRA Section 2640(a), codified at 42 U.S.C. Section 602(a)(38), and the $50 disregard provision, DEFRA Section 2640(c), codified at 42 U.S.C. Section 602(a)(8)(A)(vi), are chronologically and conceptually linked. Sibling deeming was first proposed to Congress by then-Secretary Margaret Heckler in 1982. The House and Senate Committees described the proposed measure as a provision to "(i)nclude all minor children in the AFDC unit, except for disabled children receiving SSI." S. Print No. 97-11, Senate Comm. on Finance, 97th Cong., 2d Sess.

41, Data and Materials for the Fiscal Year 1983 Finance Committee Report under the Congressional Budget Act (February 1982). It was recognized that under the Secretary's proposal, children to be included would "most commonly" be those "receiving Social Security or child support income." *Id.* There was opposition to the concept in the House, and the provision was subsequently dropped in conference. H.R. Conf. Rep. No. 97-769, 97th Cong., 2d Sess. 446 (August 17, 1982).

In 1983, Secretary Heckler again proposed a sibling deeming provision for the AFDC program "to assure that limited Federal and State resources are spent as effectively as possible." Letter of 25 May 1983 to the Honorable George Bush, President of the Senate, App. 168-169. The proposal was contained in Section 102 of a draft bill entitled "Social Welfare Amendments of 1983." In an explanation to those provisions, Secretary Heckler stated:

> Section 102 of the draft would . . . (add) a new requirement that the State include, as a member of the AFDC family (both the needs and the countable income of) the parents and the minor siblings of the dependent child for whom aid is claimed and who are living with the dependent child if the siblings are, themselves, deprived of parental support or care and under the age limit selected by the State.

Section 102 was substantially identical to the present 42 U.S.C. Section 602(a)(38). It was approved by the Senate as part of S. 2062, the Omnibus Budget Reconciliation Act of 1983. S. Rep. No. 98-300, 98th Cong., 1st Sess. 165, Report of the Committee on the Budget, United States Senate, to Accompany S. 2062 (November 4, 1984). There was again opposition in the House to the proposal, and consideration was carried over to the following session.

See House Ways and Means Committee Report, Comm. Print No. 98-24, 98th Cong., 2d Sess. 29 (1984).

In 1984, the sibling deeming rule was added by the Senate as part of the Senate amendments to H.R. 4170, the Deficit Reduction Act of 1984. There had been no provision for sibling deeming at all in the House bill. When the bill went to the House-Senate Conference Committee, the following compromise was struck:

> The conference agreement follows the Senate amendment with the following modification: a monthly disregard of $50 of child support received by the family is established. The disregard is applied at eligibility determination and benefit calculation. The provision is effective October 1, 1984.

H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. and Ad. News 2095.

Neither the Senate nor the House bill had contained any disregard provision going into the conference. Nor had there been any disregard bills contemporaneous to the two prior sibling deeming bills which had passed the Senate but failed in the House. Secretary Heckler had never proposed a disregard provision in her prior legislative packages. Although the terse Conference Agreement does not state the purpose of the disregard, the context of its enactment and its placement in the same section of DEFRA as the sibling deeming provision strongly suggest that its purpose was to mitigate the harsh effects of the new mandatory filing rule. Because it was recognized that the new rule would primarily fall upon those siblings "receiving Social Security or child support income," S. Print No. 97-11, Senate Comm. on

Finance (February 1982), *supra*,[5] it is reasonable to infer that "child support" was intended to encompass Title II payments as well as support income from an absent wage-earning parent.

Nevertheless, the Secretary insists that the primary purpose behind the disregard's enactment was to provide an incentive to cooperate by the custodial parent in obtaining child support payments from the absent parent. Because any hint of an incentive purpose is wholly lacking in the disregard's legislative history, the Secretary looks

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[5] The Secretary argues that the language differentiating between "Social Security" and "child support" in some of the early legislative history materials shows that Congress had different things in mind when it used the two terms. Brief of Pet. at 21. It should be remembered, however, that Congress at that point was grappling with the issue of what income would be affected by sibling deeming and not even contemplating the question of the applicability of the disregard, which did not appear in any prior bill or legislative proposal until it was enacted pursuant to the 1984 conference compromise. There were special problems to be considered in deeming Title II child dependent payments as available to other family members in light of anti-alienation provisions prohibiting transfer or assignment. 42 U.S.C. Section 407. It would be natural, therefore, to differentiate between the two types of payments at that point.

Significantly, no Title II-child support distinction appears in the final Conference Report or in the enacted statutory language of the disregard, the two most authoritative sources of legislative intent. While legislative committee reports are strong evidence of congressional intent, they must be read in proper context and they do not preclude placing greater weight on more persuasive evidence of intent. *U.S.* v. *Ogilvie Hardware Co.*, 330 U.S. 709 (1947). Indeed, given the context of the differentiating references and what transpired later on, the language cited by the Secretary tends more to confirm congressional intent to apply the disregard to Title II than the other way around, hence the use of the word "any" in the final enactment.

to other legislation for such a purpose and then attempts to bootstrap the disregard. His analysis is patently erroneous and contrary to basic principles of statutory construction.

The 1974 legislation cited by the Secretary created, for the first time, the statutory obligation of AFDC applicants and recipients to assign support rights and cooperate with the agency in obtaining child support. 42 U.S.C. Section 602(a)(26)(D). Prior to this amendment, cooperation in establishing paternity and pursuing child support claims was not a condition of AFDC eligibility. Indeed, the 1974 statutory amendment actually resolved conflicting judicial rulings on this issue. *See, Lascaris* v. *Shirley*, 420 U.S. 730 (1975).

Along with the change, Congress adopted—as a temporary experiment—the limited pass-through of forty percent (40%) of the first $50 of support obtained. 42 U.S.C. Section 657(a)(1). According to the legislative history, this was done because:

> . . . The Committee feels it may be desirable to offer the mother a financial incentive to cooperate. *To demonstrate the possible effectiveness of the incentives*, the Committee bill *for the first year* of the program provides that forty percent of the first fifty dollars a month in support collection for a family would be disregarded. . .

S. Rep. No. 1356, 93rd Cong., 2d Sess. 23, *reprinted in* 1974 U.S. Code Cong. and Ad. News 8155 (emphasis added). The one-year time limit was actually incorporated in the statutory language. At the end of the year, the provision was not renewed.

The Secretary asserts that the absence of a definitive statement of purpose for the disregard in the 1984 legislative history makes resort to the 1974 enactment reasonable. Brief of Pet. at 20. But Congressional silence in 1984 in no way justifies looking back ten years to the purpose of unrelated legislation. "A determination under one statute should not be mechanically carried over into the interpretation of another statute involving significantly different considerations and legislative purposes." *Local 1976, United Brotherhood of C and J* v. *N.L.R.B.*, 357 U.S. 93, 110 (1958). *See also U.S.* v. *Price*, 361 U.S. 304 (1960).

The 1974 legislation was "significantly different" because that disregard was created for a one-year limited period to support the then brand-new cooperation requirement. However, by 1984, the cooperation requirement was a long-standing condition of eligibility which was well-known by recipients. A mother who failed to cooperate knew that she would lose her AFDC. There was therefore no reason in 1984 to provide a custodial AFDC parent with a financial incentive to cooperate.

But the Secretary suggests that the disregard also serves to provide the absent parent with an incentive and cites as an illustrative example the affidavit of David Jones filed in the district court below. Brief of Pet. at 26; J.A. 46. Upset that his independently supported child was to be forced into the AFDC assistance unit by sibling deeming, Mr. Jones states: "If my son is going to be forced to receive ADC and my money will be used to finance the ADC program, I see no reason to keep paying child support." *Id.*

This example better illustrates the absurdity of using the disregard as an incentive device. Mr. Jones had been paying up to $155 per month in child support, all of it going to his son directly. J.A. 45. With sibling deeming, those

payments would be diverted to the IV-D agency to reimburse the state for the AFDC funds paid to Paula Jones' assistance unit. Does the Secretary really think that Mr. Jones will be more likely to make his monthly payment if he knows that $50 of it will be sent to his son? It is far more logical to say that the extra $50 in 1984 was meant not to motivate absent parents, but to remove some of the sting of sibling deeming for the affected children.

The respondents certainly agree with the Secretary that nonpayment of child support by non-custodial parents is a grave national problem, Brief of Pet. at 26, but it does not follow that Congress was addressing that issue in the disregard legislation. It is highly unlikely that they were given the fact that forty-two days after passage of DEFRA, Congress enacted the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378 (1984), *reprinted in* 1984 U.S. Cong. and Ad. News 2095. These comprehensive amendments addressed a whole range of support enforcement issues, e.g. federal matching of administrative costs (Pub. L. No. 98-378, Section 4), special project grants to promote improvements in interstate enforcement (*Id.*, Section 8), state guidelines for child support enforcement awards (*Id.*, Section 18), and extension of Medicaid eligibility when support collection results in termination of AFDC eligibility (*Id.*, Section 20). It does not seem plausible that while Congress was in the midst of careful consideration of a comprehensive revision of the child support enforcement structure, it would randomly insert a cooperation provision in a bill that contained no other child support amendments. It also does not seem reasonable to assume, as does the Secretary, Brief of Pet. at 21-22, that Congress had the same purposes in mind when it enacted the disregard as it did when it later passed these amendments.

The Secretary maintains that his position is plausible and entitled to deference should this Court find that Congress had any other purpose in enacting the disregard other than mitigation of sibling deeming. Brief of Pet. at 24. Such as assertion is ridiculous. Certainly it is conceivable that there is some incentive element lurking in the disregard. What the Secretary fails to realize is that an incentive can operate within the context of Title II also. If an AFDC custodial parent knew that she would retain $50 of any Title II payments coming into the household through operation of the disregard, she would conceivably be motivated to apply for Title II for her children and, if necessary, initiate paternity proceedings to establish eligibility. Admittedly, the incentive would not be great, but it would be no less than that for the non-custodial, working parents whose payments are the only child support the Secretary wishes to disregard.

The Secretary seems to suggest that the disregard ought not to apply to Title II because such application would be contrary with the budget reduction goals of DEFRA. The Senate Finance Committee estimated that enactment of the sibling deeming rule would save $455,000,000 over a period of three fiscal years. *Bowen* v. *Gilliard*, 483 U.S. at 592. Taking at face value the Secretary's own estimates, the costs of applying the disregard of Title II child dependent payments would cost $43,800,000 annually or $131,400,00 over three years. There would still be a very substantial net savings as a result of the implementation of Section 2640 of DEFRA. Moreover, this Court has cautioned against the simplistic assumption that whatever furthers the broad purposes of a statute must be the law:

> (N)o legislation pursues its purposes at all costs. Deciding what competing values will or will not be

> sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent to assume that *whatever* furthers the statute's primary objective must be the law. (Emphasis supplied in text).

Rodrigues v. *U.S.*, 480 U.S. 522, 525-526 (1987). Because the Secretary's narrow reading of the statute is contrary to congressional intent is evidenced by the statutory language, structure and history, judicial deference to his interpretation is not warranted. *Chevron*, 467 U.S. at 844.

E. The Secretary's Failure To Apply The Disregard Statute In Accordance With Its Plain Language And Mitigating Purpose Leads Him To Irrational and Inconsistent Results.

When an agency acts erratically and inconsistently, its decisions should be accorded no deference. *Adamo Wrecking Co.* v. *U.S.*, 434 U.S. 275, 287 n.5 (1978). Although the Secretary claims to have developed and implemented a comprehensive and consistent interpretation of the disregard statute which limits its applicability to a narrow set of payments, he has not in fact done so. His refusal to follow the plain statutory language or to be guided by the purpose of Congress in enacting the statute, i.e. to mitigate the harm caused by sibling deeming, has led him to some startling results. For example, in response to inquiries from state IV-D agencies as to whether the $50 disregard applies to spousal support collected by a support enforcement agency, the Secretary replied:

> The $50 disregard payment applies to both child and spousal support. This conforms to Section 12 of Public Law 98-378 which requires state IV-D agencies to

> collect spousal support if a support obligation has been established with respect to the spouse and the IV-D agency is enforcing the child support order.

53 Fed. Reg. 21644 (June 9, 1988). This constitutes an incredibly broad reading of the disregard statute. The Secretary in his answer appears to be more concerned with *how* a payment is collected than with the *purpose* of the payment. Spousal support, of course, is not even designated as being for the child and benefits the child only indirectly. Yet, the Secretary would read the statute narrowly to deny application of the disregard to Title II child dependent payments, the sole purpose of which is to support children. This is a good example of how the Secretary reads the "including" parenthetical, discussed *supra*, to limit the disregard only to those payments collected by IV-D agencies.

The Secretary's treatment of voluntary payments would also seem to be inconsistent with a professed narrow reading of the statute. 45 C.F.R. Section 303.80(a). As discussed *supra*, there is no conceptual difference between a voluntary payment received by a household in the absence of any judicial or administrative order and a Title II child dependent payment, yet the disregard is applied to the former and not to the latter.

The following hypothetical situation illustrates the absurdity of the Secretary's position: a mother with three children applies for AFDC. She does not know the whereabouts of the father of two of her children and receives no support from him. The father of the third child is disabled and drawing Social Security disability benefits. His child is receiving Title II child dependent payments as a result. Under the Secretary's current policy, the Title II payments are counted as family income but no disregard is received by the assistance unit. However, if the non-

custodial father applies to become the representative payee for his child and forwards the child dependent payments directly to his child upon receipt, the Secretary would then recognize those funds as a voluntary payment and apply the disregard. Congress certainly did not intend to make such bizarre machinations necessary.[6]

[6] Respondents have also raised equal protection challenges to the Secretary's policy in the courts below and in their Response to the Petition for Writ of Certiorari. The Secretary's disparate treatment of two similarly situated classes of child support recipients, affording one the mitigating benefits of the disregard and not the other, does implicate the Fifth Amendment. However, because the Secretary's policy so clearly violates the statute and because an Equal Protection analysis would be so similar in this case to the Step II analysis of *Chevron*, respondents believe that the Court will not need to reach the constitutional question.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

45 U.S.C. Section 602

State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents

A State plan for aid and services to needy families with children must—

* * *

(38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include—

(A) any parent of such child, and

(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title or in section 607(a) of this title (if such section is applicable to the State), if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter);